Supreme Court, U. S.
FILED
JUL 25 1975
MICHAEL RODAK, JR., CLERK

75-5032

IN THE

SUPREME COURT OF THE UNITED STATES

Term, 1975

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CRAWFORD DEAN LOWERY,

Petitioner,

v.

STATE OF NORTH CAROLINA,

Respondent.

****

RESPONSE OF THE STATE OF NORTH CAROLINA
TO PETITION FOR WRIT OF CERTIORARI TO
THE SUPREME COURT OF NORTH CAROLINA

****

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INDEX

Page

Citation to Opinions Below 1

Jurisdiction 1

Questions Presented 1

Statement of Case 2

Reasons for Not Granting the Writ 2

I. The Court should not grant certiorari to consider whether the imposition and carrying out of the sentence of death for the crime of rape under the law of North Carolina violates the Eighth and Fourteenth Amendments to the Constitution of the United States 2

II. A verdict by a jury ignorant that death is the mandatory consequence does not constitute a violation of the Eighth and Fourteenth Amendments of the Constitution of the United States 3

III. The Court should not grant certiorari in this case because the petitioner has not exhausted his remedies under the Law of North Carolina 4

Conclusion 5

TABLE OF CASES

Fowler v. North Carolina,
No. 73-7031 (Oct. Term 1974) 2,3

Furman v. Georgia, 408 US 238 (1972) 3,4

State v. Britt, 285 NC 256
204 SE 2d 817 (1974) 3,4

State v. Waddell, 282 NC 431
194 SE 2d 19 (1972) 3,4

Statutes:

H. B. 953, Chap. 749, (1975) N. C. Sess. 5

N. C. Gen. Stat. §14-21 (1974) 4,5

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ON WRIT OF CERTIORARI
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RESPONSE OF RESPONDENT,
STATE OF NORTH CAROLINA,
IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI

CITATION TO OPINION BELOW

The opinion of the Supreme Court of North Carolina is reported at 286 NC 698 (1974) and is appended to Petitioner's petition.

JURISDICTION

Petitioner seeks to invoke the jurisdiction of this Court pursuant to 28 USC §1257(3).

QUESTIONS PRESENTED

1. Whether the imposition and carrying out of the sentence of death for the crime of rape under the law of North Carolina violates the Eighth or Fourteenth Amendment to the Constitution of the United States?

2. Whether the Due Process Clause of the Fourteenth Amendment permits a State Court death sentence to be predicated upon a verdict rendered by a jury which did not know for certain that the consequences of a guilty verdict was a sentence of death?

3. Whether the United States Supreme Court should grant certiorari when the petitioner has not fully exhausted his right to appellate review at the state level?

STATEMENT OF THE CASE

Petitioner, Crawford Dean Lowery, was tried in the Superior Court of Alamance County, North Carolina, and was found to be guilty of the crime of rape. A sentence of death by asphyxiation of gas was pronounced. Petitioner appealed to the Supreme Court of North Carolina and the judgment was affirmed on the 14th day of April, 1975. Execution of the judgment was stayed in order to give Petitioner an opportunity to file a petition for a Writ of Certiorari in this Court.

Since the facts of this case have been fully stated by the Petitioner, and have been amplified in the opinion of the Supreme Court of North Carolina, they are not restated here.

ARGUMENT

I. THE COURT SHOULD NOT GRANT CERTIORARI TO CONSIDER WHETHER THE IMPOSITION AND CARRYING OUT OF THE SENTENCE OF DEATH FOR THE CRIME OF RAPE UNDER THE LAW OF NORTH CAROLINA VIOLATES THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES.

PETITIONER'S QUESTIONS 1, 2, 3 and 4

The petitioner has listed a total of six questions. The first four questions challenge that the imposition of the death penalty for the crime of rape violates the Eighth and Fourteenth Amendments to the Constitution of the United States. For this reason the State has combined these four questions into one question.

The petitioner asserts that the penalty of death is cruel and unusual punishment for non-injurious rape offenses. He also urges that the procedure through which the death penalty is applied under the law of North Carolina violates the Eighth and Fourteenth Amendments. Petitioner's assertions, in essence, question the propriety of the North Carolina Legislature to prescribe punishment. There is no valid reason for the Court to grant certiorari at this time to hear this question.

This Court granted certiorari to petitioner Jessie Thurman Fowler in the case of Fowler v. North Carolina, No. 73-7031 (Oct. Term, 1974) which, although a murder case, concerns both the issue of the constitutionality of the death penalty and the question as to whether penal policy is more appropriately to be reviewed by the Legislature than by the Judiciary. Extensive briefs were submitted in that case and oral arguments were made before this

Court on April 21, 1975. Hence, petitioner's question has, in essence,been accepted for hearing by the Court, and oral arguments before this Court have already been made. Therefore, any decision in this case should be dependent upon the outcome of the Fowler case, and the petition to grant certiorari should be denied.

II. A VERDICT BY A JURY IGNORANT THAT DEATH IS THE MANDATORY CONSEQUENCE DOES NOT CONSTITUTE A VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS OF THE CONSTITUTION OF THE UNITED STATES.

PETITIONER'S QUESTIONS 5 and 6

In questions five and six of his petition, the petitioner asserts that the Eighth and Fourteenth Amendments of the Constitution are violated whenever a jury is allowed to enter a finding of guilt without knowing that the death penalty automatically will ensue. And it is urged that the Supreme Court of North Carolina has failed to clearly state whether a judge should inform the jury that a verdict of guilty will invoke the mandatory penalty of death.

The petitioner does not state nor does the record indicate whether the jury at this trial was either aware or unaware that the death penalty was mandatory upon a verdict of guilty. Regardless, the respondent would argue that jury knowledge that a verdict of guilty invokes the mandatory penalty of death could lead to the very exercise of jury discretion that this Court sought to curtail in Furman v. Georgia, 408 US 238 (1972).

That this is the position of the North Carolina Supreme Court is clearly set out in the case of State v. Britt, 285 NC 256 204 SE 2d 817 (1974). There, the Court reiterates the position taken in State v. Waddell, 282 NC 431, 194 SE 2d 19 (1972) in which it stated:

> "The punishment to be imposed for these capital felonies is no longer a discretionary question for the jury and therefore no longer a proper subject for an instruction by the judge." 282 NC 445, 194 SE 2d 29 (1972)

In its opinion, the Court foresees deviation from this rule only in rare situations where the jury is confused or uncertain as to whether one of its permissive verdicts would result in a mandatory death sentence and sufficient compelling reason exists to justify informing the jury of the consequence of their possible verdict. State v. Britt, supra. And, the Court endorses the established doctrine that in a capital case, both the State and the defendant may, on the voir dire examination of prospective jurors, make inquiry con-

cerning a prospective juror's moral or religious scruples, his beliefs, and attitudes toward capital punishment, to the end that both the defendant and the State may be insured a fair trial before an unbiased jury. State v. Britt, supra.

The record does not disclose whether the jury was asked if any juror had any religious or moral scruples against the death penalty. And the defendant did not take exception to the trial judge's charge to the jury. Consequently, the record is silent as to whether the trial judge used any language that would indicate whether or not the jury was informed as to the penalty.

It would appear then, that the state of the law as espoused by the North Carolina Supreme Court on the issue of whether the jury should be aware of a mandatory death sentence requires no clarification; accordingly, the petitioner has failed to show prejudice. Therefore, certiorari need not be granted.

III. THE COURT SHOULD NOT GRANT CERTIORARI IN THIS CASE BECAUSE THE PETITIONER HAS NOT EXHAUSTED HIS REMEDIES UNDER THE LAW OF NORTH CAROLINA.

Prior to the Waddell decision, under the North Carolina rape statute, (N. C. G. S. 14-21), the jury had the right to recommend life imprisonment for the capital crime of rape. Furman v. Georgia, supra, ruled that this discretion was unconstitutional. In State v. Waddell, supra, the Supreme Court of North Carolina ruled that the death penalty portion of the rape statute was constitutional, but the portion concerning the jury's discretion was not and that any person convicted of a capital offense prior to the Waddell decision and who had been sentenced to death, would have the sentence commuted to life imprisonment. In all capital cases after Waddell the trial court was forbidden to allow the exercise of jury discretion in sentencing and upon conviction of a capital crime, the death sentence was mandatory. The rape statute was amended by the North Carolina Legislature through the ratification of N. C. G. S. 14-21 (Supp. 1974) which divided the crime of rape into two categories, i.e., First and Second Degree Rape. But this enactment did not become effective until April 8, 1974. Consequently, there existed a period of time between the decision in Waddell and the ensuing action of the Legislature, in which numerous individuals received death sentences under a statute which had been, in effect, established by the

Judiciary rather than the Legislature.

In order to remedy this situation, the 1975 Session of the General Assembly of North Carolina enacted House Bill 953, a copy of which is appended to this response. This statute provides that defendants who have been convicted of rape committed after January 18, 1973, and prior to April 8, 1974, and who have had the verdict and sentence of death sustained on appeal, may apply to the judge who presided at the rape trial resulting in the sentence of death, or, if said judge is unavailable, to a resident Superior Court Judge of the judicial district in which the rape trial was held, to determine whether the defendant could have been punished by death had the rape been committed by him after the ratification of N. C. G. S. 14-21 (Supp. 1974).

Whereas the date of petitioner's conviction falls within the time span qualifying him for the special judicial determination provided by House Bill 953, the appellate channels which exist under North Carolina Law have not been totally exhausted by the petitioner. Therefore, the State would submit that the Petition for a Writ of Certiorari to the Supreme Court of North Carolina should be denied.

CONCLUSION

It is therefore respectfully submitted that the question concerning the constitutionality of the death penalty as applied under the Law of North Carolina is already before this Court; that there is no evidence that petitioner was deprived of any constitutional right by the fact that some members of the Trial Court jury may have been unaware that their verdict would invoke a mandatory penalty of death; and that the petitioner has not fully exhausted the channels for appellate review provided under North Carolina Law. The Petition for Writ of Certiorari to the Supreme Court of North Carolina should be denied.

Respectfully submitted,

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Attorney General

(Signatures continued on next page)

/s/ Charles M. Hensey

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CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the foregoing Response of the State of North Carolina to Petition for Writ of Certiorari to the Supreme Court of North Carolina on petitioner by depositing the same in the United States mail to:

Mr. Donnell S. Kelly
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Graham, North Carolina 27253
ATTORNEY FOR PETITIONER

This the 22nd day of July, 1975.

/s/ Charles M. Hensey
Charles M. Hensey

GENERAL ASSEMBLY OF NORTH CAROLINA
SESSION 1975
RATIFIED BILL

CHAPTER 749

HOUSE BILL 953

AN ACT RELATING TO PUNISHMENT FOR RAPES COMMITTED PRIOR TO THE EFFECTIVE DATE OF CHAPTER 1201, SESSION LAWS OF 1973.

The General Assembly of North Carolina enacts:

Section 1. The provisions of G.S. 14-21, as rewritten by Section 2 of Chapter 1201 of the Session Laws of 1973, shall apply in all trials hereafter conducted for rapes committed after January 18, 1973, and prior to April 8, 1974, the effective date of Chapter 1201, Session Laws of 1973.

Sec. 2. (a) In cases in which the defendant has been convicted of a rape committed after January 18, 1973, and prior to April 8, 1974, and the verdict and sentence of death are or have been sustained on appeal, the defendant may apply once to the judge presiding at the rape trial resulting in the sentence of death, or, if said judge is unavailable, to a resident superior court judge of the judicial district in which said rape trial was held, to determine whether the defendant could have been punished by death had the rape been committed by him after the ratification of Chapter 1201, Session Laws of 1973.

(b) Said judge shall review a certified transcript of the evidence presented at trial (or if such transcript is not available, the record on appeal), make such independent investigation as he deems necessary to determine the age of the defendant or of the rape victim, and hear arguments or accept

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both in behalf of the defendant and the State.

(c) Thereupon, the judge shall determine the following question:

Is the evidence presented at the defendant's trial, plus additional evidence of the age of the defendant or the age of the rape victim, sufficient to submit the defendant's case to a jury on the charge of first degree rape as defined by G.S. 14-21(a), had the date of the rape been after April 8, 1974?

(d) If the question is answered in the affirmative, the defendant shall remain subject to the sentence of death. If the question is answered in the negative, the judge shall forthwith schedule a hearing for the presentation of evidence relative to resentencing the defendant; after the hearing, the sentence of death for rape previously imposed shall be vacated, and the defendant shall be resentenced as if he had been convicted of second degree rape for a rape committed after April 8, 1974.

(e) There shall be no right of appeal from the determination of the judge, but the Supreme Court of North Carolina may, upon petition for certiorari, allow review of said determination.

(f) In cases of resentencing, the defendant shall be allowed credit for time spent in custody awaiting the execution of the sentence of death.

Sec. 3. An indigent person under sentence of death for a rape committed after January 18, 1973, and before April 8, 1974, shall be entitled to counsel in making one application under this act for each such sentence of death, if he is otherwise entitled under Article 36 of Chapter 7A of the General

Statutes of North Carolina.

Sec. 4. This act shall become effective upon ratification.

In the General Assembly read three times and ratified, this the 24th day of June, 1975.

JAMES B. HUNT, JR.

James B. Hunt, Jr.

President of the Senate

JAMES C. GREEN, SR.

James C. Green, Sr.

Speaker of the House of Representatives